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IN THE HIGH COURT OF JUDICATURE

AT BILASPUR (C.G.)

Criminal Appeal No. 363/2004

APPELLANTS :1. Hariram, aged 40 years,
S/o. Sukhdev,

(IN JAIL) 2. Motiram, Aged 45 years
W/o. Raghunath
Both R/o. village Aasana
Dongaghat, Jagdalpur
P.S. Kotwali
District Middle Bastar (C.G.)

214/04

Filed on 14/01/04
by Shri D. R. Sharma
Advocate

R. to D.R. (J) 14/01/04

VERSUS

RESPONDENT : State of Chhattisgarh

AN APPEAL UNDER SECTION 374 (2) CR.P.C.

COPY

(57)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.363/2004

Single Bench: Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Hariram & another

Vs.

State of Chhattisgarh

Post for orders 30.01.2006

Sd/-
Dilip Raosaheb Deshmukh
Judge

(58) AFR.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.363/2004

Single Bench: Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Hariram & another

Vs.

State of Chhattisgarh

PRESENT: -

Shri D.R.Sharma, Senior Counsel with Shri B.D.Badgayan, learned counsel for the accused-appellants.

Shri J.D.Bajpai, Govt. Advocate/Additional Public Prosecutor for the State.

JUDGMENT

(Delivered on 30-01-2006)

This appeal is directed against the judgment dated 22-11-2003 delivered by Shri R. S. Sharma, Special Judge, S.C. & S.T. (Prevention of Attrocities Act), Bastar at Jagdalpur in Sessions Case No.344/2003 whereby the appellants were convicted under Section-376(2)(G) of the I.P.C. and were sentenced to rigorous imprisonment of 10 years and fine of Rs.5,000/- and in default of payment of fine to undergo additional rigorous imprisonment of 2 years.

2. Briefly stated the prosecution story is that the prosecutrix Kondi Bai aged about 32 years, a divorcee is deaf and dumb. Sirpati PW-1 is the brother of the prosecutrix. On 29-05-2003, the prosecutrix Kondi Bai had gone with her son Damru PW-2 to the house of Sirpati PW-1. On 30-05-2003, Sirpati PW-1 had gone to village-Kurkura with some work and his wife Mula Bai PW-3 and the prosecutrix were at home. At about 4 P.M., the prosecutrix Kondi Bai PW-8 along with her son Damru aged about 7 years had gone to Mango Plantation for picking Mangoes. The appellants came there and threatened Damru PW-2, who ran away. Thereafter, the appellants committed rape on the prosecutrix one by one. The prosecutrix returned home. On 01-06-2003 i.e. 2 days after the occurrence, the prosecutrix informed Sirpati PW-1 on his return about the incident by signs. Damru PW-2 told Sirpati PW-1 the names of the accused-appellants. The prosecutrix identified the appellants as the perpetrators of the crime. Sirpati PW-1 accompanied by the prosecutrix went to Police Station-Kotwali, Jagdalpur which is situated at a distance of 5 K.M. and lodged F.I.R. Ex.P-2 on 02-06-2003 at 11 P.M. at night. The prosecutrix was sent for medical examination. Dr. Smt. Hina Ahmed, PW-10 examined the prosecutrix on 03-06-2003 but did not find any signs of sexual intercourse on the prosecutrix and expressed in-ability to give a definite opinion. She did not find any injuries on the prosecutrix. The hymen had a old tear and was of normal size. The Uterus was also of normal size and there was no injury in the private parts. Dr. Shri Sanjay Basak PW-9 examined both the accused-appellants on 04-06-2003and opined that they were

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capable of performing the sexual intercourse. No external injuries or and no injury on the genitals of both accused/appellants was found. After completion of investigation, both the accused-appellants were prosecuted for the offences punishable under Section-376(2)(G) of the I.P.C. Both the accused-appellants abjured the guilt, pleaded innocence and led no evidence in defence. The prosecution examined as many as 10 witnesses. The Trial Judge relying upon the testimony of the prosecutrix and Sirpati PW-1 & Damru PW-2, convicted and sentenced the appellants as shown in para-1 (Supra).

3. Learned Senior counsel for the appellants Shri D.R.Sharma has argued that the evidence led by the prosecution does not satisfy the legal requirement of proof under Section-376(2)(G) of the I.P.C. It was also contended that there was absolutely no evidence of penetration in this case. The prosecutrix was a deaf and dumb person. Her evidence was recorded with the help of interpreter who did not say that the accused-appellants had caused penetration of their penis inside the vaginal orifice of the prosecutrix. In the absence of such proof, the offence of rape was not established against the accused-appellants. It was also contended that there was no satisfactory explanation for the delay of 3 days in lodging the F.I.R., when the Police Station-Kotwali was situated at a distance of 5 K.M. It was also argued that Mula Bai PW-3 wife of Sirpati PW-1 to whom the prosecutrix had informed about the incident by making gestures, did not support the prosecution story. On the other

hand, Shri J.D.Bajpai, Govt. Advocate/Additional Public Prosecutor for the State has argued in support of the impugned judgment of Lower Court. Learned State Counsel has strongly placed reliance on ***Kanwar Pal S. Gill Vs. State (Admn. U.T. Chandigarh)*** reported in **A.I.R.-S.C.W.-3590** and ***State of Punjab Vs. Ramdeo Singh*** reported in **2004(2) C.G.L.J.-66**. while contending that there was a proper explanation for the delay in lodging the F.I.R. He also contended that the evidence of penetration for the offence punishable under Section-376(2)(G) was merely a technicality and not a legal requirement and in the absence of specific proof thereof conviction under Section-376 (2)(G) could be sustained. He also argued that the prosecutrix complaining of having become the victim of offence of rape is not an accomplice of the crime and there is no rule of law that the testimony cannot be acted without corroboration in material particulars. He strongly contended that absence of injuries on the person of the prosecutrix did not falsify her testimony since she was a married woman and was habitual of sexual intercourse. On these grounds, he supported the impugned judgment.

4. Having considered the rival contentions and perused the evidence available on record, the first point which requires consideration is whether in an offence under Section-376(2)(G)of I.P.C., the evidence of even the slightest penetration of penis inside the vaginal orifice of the prosecutrix was necessary or not. Rape is defined in Section-375 of I.P.C. as under :-

" **375-Rape**- A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions :-

First -Against her will.

Secondly- Without her consent.

Thirdly- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly - With or without her consent, when she is under sixteen years of age.

Explanation- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. (Underlined by me)

Exception- Sexual intercourse by a man with his own wife, the wife being under fifteen years of age, is not rape.

The Apex Court in ***Madan Gopal Kakkad Vs. Naval Dubey & another*** reported in **1992-JLJ-377** has held that even

slightest penetration without emission of semen constitutes the offence of rape. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It was, therefore, quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. Thus, even the slightest penetration constitutes the offence of rape. In ***State of Karnataka Vs. Sureshbabu Puk Raj Porral*** reported in **A.I.R.-1994-Supreme Court-966,** the Statement of victim of rape in examination-in-chief as well as during cross-examination was that the accused did something to her which he ought not to have done. She did not disclose specifically as to what exactly the accused did on her. She had merely said that the accused-appellants were having intercourse against her will. In the absence of evidence to support the prosecution story that the accused had committed sexual intercourse with her, it was held that the offence of Section-376 of the I.P.C. was not made out.

5. For proof of offence under Section-376 (2)(G) of I.P.C., it is thus absolutely essential for the prosecution to lead evidence of penetration of the penis by the accused-appellant inside the vaginal orifice of the prosecutrix. The prosecution has not led any evidence in this regard. This requirement of law is not a mere technicality. The case law cited by the learned Additional Public Prosecutor does not apply to the present case since the facts and circumstances of the case law cited are clearly distinguishable. It is also the duty of the Court,

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to elicit from the prosecutrix what she meant by using words like " Bura Kaam", "Galat Kaam", "Sambhog" and whether penetration had taken place. The Court, while recording the evidence of the prosecutrix in a case for an offence under Section-376 IPC is not to act like a mere spectator and to record evidence mechanically but has to satisfy that the questions put to the prosecutrix háve been understood by her before answering. In a case like this where the prosecutrix is a deaf or dumb person the Court must record the demeanor of the witness as to what gestures or signs she made to signify "Sambhog" or "Bura Kaam". In the present case, the testimony of Dhaniram PW-5, Trinath PW-4 and Mula Bai PW-3 did not show that soon after reaching home or even before the villagers Kondi had made any such gestures or signs to signify sexual intercourse with her. In her statement Para-1, Kondi Bai had stated that the accused-persons had committed " *Galat Kaam*". What she meant by " Galat Kaam" has not been explained. She stated that "Galat Kaam" was done near the tank but in cross-examination para-2 she has stated that sexual intercourse was committed on her outside the room. Kondi Bai PW-8 has in para-2 deposed through an interpreter that she had sustained injuries on her back, waist etc. and lot of blood had also oozed from her body. She also stated that her bangles were broken, clothes were torned. However, the medical evidence of Dr. Smt. Hina Ahmed PW-10 does not corroborate the above version. This renders her testimony wholly unworthy of credit. The evidence led by the prosecution thus falls short of the requisite legal proof to constitute the offence of rape.

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6. Coming to the evidence led by the prosecution Sirpati PW-1 in para-2 stated that after returning home the prosecutrix had, by making signs told him that a man had committed rape on her while the other person had threatened the child Damru PW-2. Thus even as per Sirpati PW-1 no gang rape had been committed on Kondi Bai. Sirpati PW-1 further stated that he asked Damru as to what had happened whereupon Damru identified Motiram as the person committing rape on Kondi Bai and said that the other person Hariram had merely threatened him. The testimony of Damru PW-2 therefore assumes relevance. Damru PW-2 has in para-2 stated that when he had gone with Kondi Bai for picking-up mangoes, the accused-appellant Hariram had caught hold of her mother and threatened him with a Danda and took her mother away. In the next breath, he said that Tio i.e the accused Motiram had threatened him, thereafter his mother was taken into the field and she returned home at night. In cross-examination para-10 he sharply contradicted the above by saying that Kondi returned within five minutes and he returned home with her. He had told Sirpati PW-1 that his mother was caught and taken away by Hariram. Damru PW-2 nowhere disclosed that he witnessed the sexual intercourse committed by the accused-appellants. In para-7, he has denied that upon being threatened he ran away to the road and asserted that he was crying and standing at the place of occurrence. In cross-examination in para-9, he has stated that since he did not see his mother he was crying and when his mother Kondi bai came after 5 minutes, he returned home with her. By any stretch of imagination, the evidence of Damru PW-2 does not lead to

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an inference that Kondi Bai was subjected to sexual intercourse by any of the appellants. Testimony of Sirpati PW-1, therefore, fails to inspire confidence.

7. Dhaniram PW-5 has also stated that Kondi had made gesture by holding her hair and pointed to both the accused-appellants. Trinath PW-4 has stated that Kondi had merely pointed to both accused-appellants and had made gestures that her hand was held by the accused persons. Thus, Kondi did not make any such gesture so as to signify rape on her.

8. Mula Bai PW-3 has stated that Kondi Bai was trying to tell her something by making gestures but she could not understand what Kondi Bai wanted to tell her. She is the wife of Sirpati PW-1 and was present at the house when after the occurrence Kondi Bai had returned with Damru. She has specifically denied that Kondi Bai had told her that 2 persons had forcibly lifted her and committed rape on her when she had gone to pick-up mangoes. She further stated that Kondi did not identify the accused-appellants. It is also pertinent to note that despite the Police Station being only 5 K.M. away from the house of Sirpati PW-1, neither Mula bai PW-3 nor Trinath PW-4 or Dhaniram PW-5 took Kondi Bai to the Police Station to lodge any F.I.R.

9. Having gone through the prosecution evidence in its entirety, the following points emerge :-

(A) Damru PW-2 who was eye-witness did not testify that either of the accused-appellants committed rape on Kondi Bai.

(B) The testimony of Kondi Bai that she has sustained several injuries on her body with blood oozing therefrom is rendered unreliable in view of the testimony of Dr. Smt. Hina Ahmed, PW-10.

(C) Mula Bai PW-3 who was present at home and to whom Kondi Bai had made certain gestures could not make out that Kondi was subjected to rape.

(D) The Testimony of Dhaniram PW-5 and Trinath PW-4 also does not show that on the date of occurrence Kondi had made certain gesture to signify rape on her.

(E) The testimony of Sirpati PW-1 in para-2 that Damru had identified Motiram as the person committing rape on Kondi Bai is rendered unreliable since Damru PW-2 has not corroborated the above fact.

(F) There is no legal evidence that even the slightest penetration had taken place inside the vaginal orifice of the prosecutrix.

(G) The broken bangles or the blouse of the prosecutrix which was torn, was not seized during investigation.

10. In the result, the conviction of the accused-appellants under Section-376(2)(G) of the I.P.C. cannot be sustained in the eye of law. The appeal is allowed. Conviction of the appellants under Section-376 (2)(G) of the I.P.C. and sentence imposed thereunder are set aside. The appellants are acquitted of the charge under Section-376(2)(G) of the I.P.C. The appellants

shall be set at liberty forthwith, if not required in any other case. Fine, if paid, shall be refunded to the appellant.

Sd/-
Dilip Raosaheb Deshmukh
Judge

Tumane